such prior convictions, nor the issue of the defendant's identity should be submitted to the jury until they return a verdict of guilty on the principal issue of the specific crime charged. *State v. Ferrone* (1921) 96 Conn. 160, 113 Atl. 452.

The decision is the first in the United States to reach this most desirable result without an express statute. Such a statute exists in only one state. Wash. Rem. & Bal. Code, 1903, ch. 2179; *State v. Driscoll* (1915) 86 Wash. 245, 150 Pac. 2. The great majority of jurisdictions however, in applying the universal habitual offender statutes (similar to that of the instant case and providing for an increased sentence if the defendant has been imprisoned before) accept the apparently settled doctrine that the jury tries both issues at the same time. Most of the cases which follow this rule do so protestingly and because of a supposed inability to do otherwise. *State v. Findling* (1913) 123 Minn. 413, 144 N. W. 142. They point to the English Statute which specifies the procedure as adopted in the instant case as proof of the necessity of legislative action. *People v. Sickles* (1898) 156 N. Y. 541, 51 N. E. 288. But this belief is based on a lack of knowledge of the history of the Statute. In 1834, under the usual habitual offender statute, Lord Justice Park said that the previous custom had been not to let the jury know of the previous convictions until after a verdict of guilty on the subsequent offence, but at a meeting of the judges, his brothers decided that both issues must be proved before the witness was called on for his defence. (1827) 7 & 8 Geo. IV, c. 28, sec. 11; *Rex v. Jones* (1834, K. B.) 6 Car. & P. 391. Two years later, to rectify this incorrect practice, a statute was passed deferring the reading of the charge of the previous offences in the indictment and the offering of the supporting evidence until after a verdict of guilty. (1836) 6 & 7 Will. IV, c. 110; *Reg. v. Martin* (1869 Q. B.) L. R. 1 C. C. R. 214. And it is important to notice that even in offences where it was necessary to allege the previous convictions in the indictment, not covered by this later statute, its rule was applied. *Reg. v. Woodfield* (1887) 16 Cox C. C. 314; (1828) 9 Geo. IV, c. 69, secs. 1, 5. Our courts have also seemed to confuse the necessity of giving the defendant a jury trial on the issue of the prior convictions with the order in which it should be done, which was probably the error into which the English judges fell in the advice they gave Lord Justice Park. Courts are practically unanimous in holding that in order to validate the sentence of increased punishment the defendant must be told in the indictment of the entire charge against him, i. e., the subsequent offence and prior convictions, and he must be given a jury trial to show his identity with the accused in the prior convictions. *State v. Compagno* (1910) 125 La. 659, 51 So. 681; *Commonwealth v. O'Reilly* (1920) 94 Conn. 698, 110 Atl. 550. A statute permitting an increased sentence without allegation of prior convictions in the indictment has been held unconstitutional. *Commonwealth v. Harrington* (1880) 130 Mass. 35. But three jurisdictions, in order not to make necessary, as they think, the simultaneous trial of the two issues, permit this obvious irregularity, and the judge, after a verdict of guilty on the subsequent offence, hears evidence or inspects the record to impose the greater sentence, without allegation in the indictment, or a jury verdict on the previous convictions. *McWhorter v. State* (1903) 118 Ga. 55, 44 S. E. 873; *State v. Parris* (1911) 89 S. C. 140, 71 S. E. 808; Okla. Gen. Sts. 1903, ch. 5574. There is no reason, because of any rule of procedure, for making the charge of the previous convictions in the indictment, expressly intended for the defendant's protection, the instrument of his conviction, when that conviction has the more serious consequences. The courageous and thoroughly satisfactory solution of the instant case should lead to a new line of decisions.

DAMAGES—CONTRACTS—WRONGFUL DISCHARGE AS BREACH OF CONTRACT OF SERVICE.—The defendant had contracted to employ the plaintiff as its agent for the period of one year beginning the first of December. On the thirty-first of July the plaintiff was dismissed without cause. The plaintiff brought suit for wages from

the first of August to the first of December. *Held,* that the plaintiff could not recover. *Harrington v. Empire Cream Separator Co.* (1921, Me.) 115 Atl. 89.

The fiction of constructive service is everywhere losing ground. There is a sharp distinction between an action for wages accruing after the wrongful discharge of an employee and an action for damages for breach of the contract of employment. *Viall v. Lionel Manufacturing Co.* (1917) 92 Conn. 341, 102 Atl. 709. Lord Ellenborough first evolved the theory that a servant who had performed part of his contract of service and was ready, willing, and able to serve the balance should in contemplation of law be regarded as having served the whole. *Gandall v. Pontigny* (1816, N. P.) 1 Starkie, 198. But the doctrine has been repudiated in England and most American states. *Emmens v. Elderton* (1853) 4 H. L. Cas. 624; *Hayes v. Harshaw* (1913) 30 Ont. L. R. 157; *Saunders v. Stern Bros.* (1916, Sup. Ct.) 158 N. Y. Supp. 878; *Viall v. Lionel Manufacturing Co.* (1916) 90 Conn. 694, 98 Atl. 329; *Jameson v. Board of Education* (1916) 78 W. Va. 612, 89 S. E. 255. That the doctrine does not operate successfully in practice is not remarkable. It requires a discharged servant to remain idle and wait until the end of the term to recover, since he cannot accept other employment and still be ready and willing to offer his contractual service. It is inconsistent with the universal rule that diligence must be used to mitigate damages. The employee must either wait until the end of the term or bring successive actions at the end of each divisible period for each instalment of wages, thus creating unnecessary litigation. An action for damages brought at any time after the breach of the contract has found more favor and is more expeditious and fair. *Davis v. Dodge* (1908) 126 App. Div. 469, 110 N. Y. Supp. 787; *Pierce v. Tenn. etc. Ry.* (1898) 173 U. S. 1, 19 Sup. Ct. 335. It has been criticized on the ground that the damages are speculative and difficult of ascertainment. See *Hicks v. National Surety Co.* (1915) 185 Mo. App. 500, 172 S. W. 489. Their measure is broadly stated to be the amount which the employee would have earned under the contract, after deducting the sum he might reasonably earn in similar employment between the time of discharge and the end of the term fixed by the contract. But the jury may take into consideration any other elements, such as the uncertainty of the working ability of the employee, his age, and the multitude of factors which enter into the assessment of damages for personal injuries. *Stearns v. Lake Shore & M. S. Ry.* (1897) 112 Mich. 651, 71 N. W. 148; *Moore v. Central Foundry Co.* (1902) 68 N. J. L. 14, 52 Atl. 292.

EVIDENCE—ADMISSIBILITY OF SPECIFIC INSTANCES OF CONDUCT TO SHOW NEGLIGENCE.—The plaintiff, while a passenger in an automobile approaching a reservoir, was shot by one Matri, a guard hired by the defendant. The plaintiff introduced evidence of a third party that the latter drove to the reservoir shortly after the shooting, was stopped by Matri, who, appearing very much excited, raised his gun and told him he had a good mind to blow his brains out. *Held,* that the evidence of the third party was a species of character evidence and improperly received. Burpee, J., *dissenting. Richmond v. City of Norwich* (1921, Conn.) 115 Atl. 11.

Since character is actually evidenced by conduct, an opinion by a witness intimately acquainted with the individuality of the person in question, derived from innumerable manifestations, seems to be more accurate evidence of character than reputation. *Mathewson v. Mathewson* (1908) 81 Vt. 173, 69 Atl. 646. There is a strong dictum to this effect in the instant case. However, the courts almost universally admit only reputation to prove character. *Negociacion Agricola y Ganadera de San Enrique v. Love* (1920, Tex. Civ. App.), 220 S. W. 224; 3 Wigmore, *Evidence* (1904) secs. 1985, 1986. A third method of proving character is by specific instances of conduct. They are rarely admitted in civil cases when offered as evidence of the doing of an act because they raise collateral issues and may result in unfair surprise. *Veit v. Class & Nachod Brewing Co.* (1906) 216